IN THE

Supreme Court of the United States

October Term, 1940.

No. 624.

PHOENIX FINANCE CORPORATION, a Corporation of the State of Delaware,

Petitioner,

v.

IOWA-WISCONSIN BRIDGE COMPANY, a Corporation of the State of Delaware,

Respondent.

Reply Brief for Petitioner.

JAMES R. MORFORD,
Attorney for Petitioner.

MARVEL & MORFORD,
ZIMMERMAN & NORMAN,
CASPER SCHENK,
Of Counsel.

...national, 236 Chestnut St., Philadelphia

TABLE OF CONTENTS FOR REPLY BRIEF.

TABLE OF CITATIONS.

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REPLY BRIEF FOR PETITIONER.

REPLY TO RESPONDENT'S STATEMENT OF THE CASE.

Preliminary Statement.

The petitioner believes that the brief for respondent can be of but little assistance to the court in an appraisal of the true factual situation of the *two* causes below. A proper chronology of the several procedural steps is the first essential. Respondent's brief has confused facts, pleadings and rulings in the Foreclosure Cause with facts, pleadings and rulings in the Supplemental and Ancillary Cause in such a way that the court will find it difficult to understand the continuity and inter-relation of events and the exact status of the parties and issues.

Repeatedly throughout respondent's brief are statements analogous to that contained on page 3 where respondent says that petitioner's brief is "saturated with statements not supported by the record," and page 61 where the respondent charges petitioner with "deliberate misstatement." No useful purpose can be served in this reply by an extended criticism of such intemperate language. A careful review and analysis of respondent's brief, however, has failed to prove a single material inaccuracy contained in the petitioner's brief or a single point where a fact alleged is unsupported by the record references given.[1]

Actually there can be but little dispute as to the facts but these facts are so scattered through the records of the two cases and are of such volume and discontinuity that confusion may and does readily result from failure to scrutinize fully and carefully the numerous statements that certain facts are or are not "supported by the record."[2]

In the final analysis, the real dispute is not as to the facts but as to the legal conclusions to be drawn from the facts. In this respect, the respondent has confused law with fact, and throughout its brief has gratuitously challenged conclusions of law and charged misstatement with respect thereto. On the other hand, respondent's brief is replete with conclusions of the respondent where the *basic* facts are either not given at all or are incompletely or incorrectly stated.

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[1] On page 19 of petitioner's brief, reference is made to an objection of Mr. Sloan at the hearings before the Master and F. R. 637 is cited therefor. As respondent points out (brief, 37, 61), objections were also voiced or statements made by Mr. Sloan at F. R. 656, 659, 660, 661 (not 650-651 as stated, brief, 37). The point respondent misses, however, is that all of these references bear out the "two state" procedural understanding of the parties and do not bear out respondent's contention that Phoenix *defended on the merits.*

[2] Petitioner in the Foreclosure Cause made a strenuous effort to straighten out the record by motion to correct and expunge (F. R. 727-755). Except for inconsequential corrections the court overruled the motion (F. R. 755).

Then again, the respondent has misconceived and misunderstood the entire point of the "Foreword" to petitioner's brief and Point I of petitioner's argument. The decision in the Delaware case is not relied upon by petitioner *as a part of the record herein.* It is merely cited as a case in point just as other authorities of courts of competent jurisdiction are cited. Furthermore the decision is of peculiar and persuasive authority, because it relates to precisely the same parties, factual record and issues as the case before the Supreme Court. It relates to a part of this case to such an extent that the legal principles there involved are precisely the same principles primarily applicable to this entire case.

Furthermore, as a matter fortifying the discretionary jurisdiction of this Court in a writ of certiorari to the Circuit Court of Appeals, it was deemed advisable that the petitioner point out and emphasize the existing conflict between decisions of the Delaware Court and the Circuit Court of Appeals for the Eighth Circuit on the same subject.

Point I of petitioner's argument states the necessary premise for the consideration of the law of the case, viz., that the problem before the Supreme Court should be *tested* by the principles applicable to the construction of the "Full Faith and Credit Clause" of the Federal Constitution and the principles applicable to the defense of *res adjudicata* when raised in a second jurisdiction. In other words, it is quite apparent that one rule of law or set of principles should not be applied by the Federal Court in determining the effect and scope of its decree and another rule of law or set of principles applied by a state court of second jurisdiction where the same question is

presented by subsequent suit wherein the defense of *res adjudicata* is relied upon.

The question is: What rules of law or legal principles are applicable to both situations? The petitioner has cited and relies upon the Delaware decision (among other authorities) as giving substantial and persuasive support to its primary contention.

There are but the two following basic questions of law before the Supreme Court:

(1) *Was the decree in the Foreclosure Cause such an adjudication against Phoenix Finance Corporation as to the issues in the several Delaware cases as to be entitled to "full faith and credit"?*

(2) *Assuming such adjudication, was Phoenix Finance Corporation as the defendant in a Supplemental and Ancillary Bill to implement and enlarge that decree, entitled to challenge the same as "wrong" under "Lord Redesdale's Rule"?*

In the following (1) is referred to as Petitioner's "primary" contention and (2) as Petitioner's "alternative" or "secondary" contention. All other questions discussed in petitioner's brief relate to integral parts of, or off-shots from, these two fundamental questions. With respect to the alternative contention, *supra*, petitioner contends that it is entitled to challenge any purported finding of fact in the Foreclosure Cause which is not supported by competent evidence or is otherwise "wrong". Consequently, the petitioner with respect to the challenged findings in the Foreclosure Cause has stated what it earnestly and sincerely believes the facts to be and has given proper record references in support thereof. Furthermore the petitioner forti-

fied its *challenge* in this respect by tenders of evidence (R. 192-223, 238, 250, 272-292). All such tenders were rejected by the Court (R. 223-224, 256, 257, 287, 288, 289, 290).

The discourse of the respondent shows an utter failure on its part to appreciate just what the questions are, and its brief is such a confused and muddled presentation of the subject (both as to law and facts) as to constitute an ineffective answer to petitioner's brief and argument.

Inaccurate, Incomplete or Misleading Statements of Fact and Inferences in Respondent's Brief Tending to Misinform the Court and to Confuse the Issues.

The following discussions have reference to statements and inferences appearing on the indicated pages of respondent's "Statement of the Case":

(pp. 1, 2) The $3,125-$2,000 notes case was tried before the Delaware Superior Court on June 15, 1939 (R. 439) and submitted on briefs and argument. The Supplemental and Ancillary Bill below was filed in the District Court on September 18, 1939 (R. 2, 745). *Preliminary* injunction thereon was granted on October 7, 1939 (R. 132, 747), but the final decree was not granted until March 23, 1940 (R. 719) and the *permanent* injunction did not issue until March 25, 1940 (R. 756). The opinion of the Delaware Court in the $3,125-$2,000 notes case was rendered March 18, 1940 (14 Atl. (2d) 386).

(p. 4) The trial court below found as a matter of *law*, not as a matter of *fact* that the issues of the Delaware actions with respect to the $50,000 mortgage were involved in and adjudicated in the Foreclosure Cause. This confusion of the respondent as to what are matters of fact and what are matters of law, underlies its entire presentation of the

subject. *This point is the primary question of law before the Supreme Court.*

Furthermore, the principles stated in the cited case of *Alabama Power Co. v. Ickes*, 302 U. S. 464, and other cases cited on page 4 of respondent's brief are unquestioned. The point respondent has failed to grasp is that under petitioner's second or alternative contention above stated, a decree otherwise unassailable may be challenged as "wrong" upon an ancillary bill to implement and enlarge it. As this Court said in *Lawrence Mfg. Co. v. Janesville Cotton Mills*, 138 U. S. 552, at p. 561:

> "But where a party returns to a Court of Chancery to obtain its aid in executing a former decree, *it is at the risk of opening up such decree as respects the relief to be granted on the new bill.*" (emphasis supplied)

(pp. 4-13) Here the respondent has denominated a section of its brief as "Issues on Supplemental and Ancillary Bill". The only matter contained under this heading is the respondent's analysis of its own Supplemental and Ancillary Bill of Complaint below and its self-serving conclusions with respect thereto. Since that bill and the amendment thereto appear in full at pp. 3-100 of the Record and are concisely and accurately stated as to legal effect on pp. 4 and 6 of petitioner's brief, it is difficult to understand respondent's motive in thus unnecessarily enlarging upon the printed material the Court is called upon to consider. In any event, the respondent has wholly failed to state, and apparently does not comprehend, just what the *issue* is or what that term connotes.

The "*Issues* on Supplemental and Ancillary Bill" were essentially the two questions of *law* now before this Court

as above stated. With the striking of the major portion of petitioner's Answer and Counterclaim (R. 171-172), there remained practically no material issues of fact. The correctness of the ruling thus striking parts of the Answer and Counterclaim and in rejecting evidence to support the pleaded averments stricken are further issues of law for the consideration of this Court under petitioner's second or alternative contention *supra*.

(pp. 14-25) Here again, under the heading entitled "Answer and Proceedings Thereon," respondent has given its conception of what the petitioner's Answer and Counterclaim contained. This pleading appears in full at pp. 146-167 of the Record. The obvious purpose of the stricken portions of petitioner's Answer and Counterclaim was to challenge the Foreclosure Decree as "wrong" under "Lord Redesdale's Rule", thereby calling for the application of the doctrine of *Lawrence Mfg. Co. v. Janesville Cotton Mills, supra.*

Consequently when we find the respondent saying in a footnote on p. 19 of its brief that they "are met with the effrontery of Phoenix saying that all this ought to be disregarded as though Phoenix had not had a day in court although it conducted the entire proceedings.", we are led to the inevitable conclusion that the respondent does not realize that by filing the Supplemental and Ancillary Bill, it was *"at the risk of opening up"* the foreclosure decree "as respects the relief to be granted on the new bill."

(p. 16, footnote 3) Respondent says that "The question of consideration of the Helmer N. Anderson bonds was fully litigated and determined, * * *." Anderson was not made a party to the Foreclosure Cause in any classification and did not participate in the cause directly or indirectly. He is an

entire stranger to the record and there was no pleaded issue or prayer warranting the reduction of his $7400 of bonds to $6000 (See petitioner's Brief p. 36).

(p. 18, part of footnote 3) Respondent says that "On oral argument before the Master on the 25th day of October, 1935, it was stated *by counsel for the parties* that the entire case was submitted." As pointed in Petitioner's Brief (pp. 17-21) Phoenix did not participate at the trial or in the argument. Phoenix' counsel did not at any time so state (F. R. 691-695). At another point (p. 37) respondent also refers to the appointment of the special master by agreement of "counsel for the parties". Phoenix or Phoenix' counsel did not at any time so agree. Only the counsel for the Trustee Complainants and the intervener Kendrick so agreed (F. R. 107).

(p. 25) As in former briefs (in fact, the wording and record references are copied exactly from other briefs), the respondent makes the incomplete and misleading statement that the Foreclosure Cause "was instituted at the request and instigation of appellant, Phoenix Finance Corporation, and carried on at the expense of and under the direction of said Phoenix Finance Corporation by attorneys of its selection." No attempt has been made by the respondent to challenge, supplement or correct the statement of the *actual facts* in this respect as contained on pages 5 and 6 of petitioner's brief.

Furthermore, Exhibits B-2, F. R. 1479; B-4, F. R. 1480; B-6, F. R. 1481, are letters of Phoenix Finance Corporation. They relate to correspondence addressed to *Phoenix Finance Corporation.* They were written in 1933 and 1934, after Phoenix Finance System, Inc., a corporation, had sold out its every interest in the Bridge Company. The finance

business of Phoenix in its various branches, was known as the "Phoenix Finance System" under an appropriate trademark. This trademark no longer bore any relation to and obviously was not the tradename of the body corporate, "Phoenix Finance System, Inc." Accordingly, when counsel for plaintiff in error refers to "on stationery Phoenix Finance System, predecessor Phoenix Finance Corporation" (Brief, p. 25) it is felt that counsel, after previous notice of this same error, has indulged in more than accidental misstatement. Again, where counsel (Brief, pp. 25-26) refers to Mr. Thompson, President of Phoenix Finance Corporation, as president "of its predecessor", we find the record incorrectly stated. Mr. Thompson was not president of Phoenix Finance System, Inc., when those letters were written in 1933 and 1934. That corporation was dissolved August 1932 (F. R. 419). There is nothing in the record that it was anything more than a "predecessor in interest". As a corporate entity it was not a "predecessor" of Phoenix Finance Corporation in a legal sense (see petitioner's brief, p. 14).

(pp. 26, 27.) Respondent has here set out Section 10 of the Trust Indenture. Whatever may be the legal effect of this section and passing entirely the question as to whether in any event it evidences a power of attorney *granted by bondholders* to the trustees, the obvious and conclusive answer is that the *Foreclosure Cause was not instituted by the Trustees under the purported authority of that Section.* Foreclosure was sought under Section 3 (c) of the Indenture set forth on p. 70 of petitioner's brief which respondent has conveniently ignored. *The agency or extent of the representation of the Trustee Complainants must of necessity be determined by that section of the In-*

denture conferring the power sought to be exercised and not by some other section under which the Trustees have never purported to act.

(p. 30.) In the Foreclosure Cause, it is true that the Court *purported* to appoint Oscar R. Thorson, as receiver "of all and singular the property of the Iowa-Wisconsin Bridge Company, real, personal and mixed, of every kind, acquired by or belonging to said Defendant Company." While not deemed material to the case at bar, it is pointed out that the District Court for the Northern District of Iowa, under familiar principles, lacked jurisdiction to appoint a *general* receiver of a Delaware corporation, and its action in this respect is only effective to the extent of the prayer for a receiver of the property covered by the lien and within the jurisdiction of the Court (F. R. 11).

(p. 33.) The question as to whether the Trustee Complainants in a mortgage foreclosure cause, *represented* Phoenix Finance Corporation, a bondholder, to such an extent as to make possible an adjudication of legal choses in action personal to it, such as claims on notes, contracts and open accounts of Phoenix against the Bridge Company, and of set-offs or counterclaims with respect to alleged choses in action of the Bridge Company against Phoenix, is a principal question of *law* implicit in petitioner's primary contention. The respondent, however, at this point and elsewhere, treats the question as a matter of *fact*. Furthermore the *ex parte* statement of counsel for the Trustee Complainants, even though such counsel had been engaged at the "suggestion" of the bondholder requesting foreclosure (see petitioner's brief, p. 5) was ineffective, under any known principle of equity practice, to take the place of either pleading or proof.

On the same page in the reference to the answer of Phoenix Finance Corporation to the intervention petition, respondent has quoted incorrectly therefrom. The exact language from the record is that Phoenix asked "that its rights as holder of bonds *secured by said mortgage* be fully protected herein" (F. R. 92). The convenient omission of the italicized words effects a substantial change in meaning and effect.

(Pp. 34-35.) The Respondent has here referred to finding No. 41 of this Court in the Foreclosure Cause as conclusive. With respect thereto, it is stated (p. 35): "This finding * * * is *res adjudicata*, not subject to re-examination in this ancillary proceeding." *If such finding is not within the issues, is not supported by the record, or is not a fact, then it is "wrong" and "Lord Redesdale's Rule" as recognized by this court permits the re-examination thereof in the ancillary and supplemental proceedings.* It is this secondary matter of law in this case that respondent either does not understand or chooses to ignore. The matter of alleged interlocking *control* is separately treated and fully discussed under an appropriate heading, *infra.*

Again at page 35, respondent asserts that certain Bridge Company bonds were delivered to Phoenix Finance System, Inc. pursuant to a resolution of the Bridge Company board "while controlled by John A. Thompson, president of both Phoenix Finance System, Inc. and Phoenix Finance Corporation and his associates." *There is nothing in the record to support this unfounded and incorrect statement of fact.* In support thereof, the respondent cites F. R. 201-202. That was finding No. 40 of the Court in the Foreclosure Cause. F. R. 979 to 982 is similarly cited. This is the minute record of the meeting of the board of the Bridge Company of March 7, 1932. It shows merely what

directors were present. No *fact* record was cited, and no *fact* record exists which lends any measure of support to the above statement, directly or inferentially. On the same page, the respondent alleges "like control" with respect to the Bridge Company board resolution of July 8, 1933. There is no record evidence of such fact. For a full discussion of this question the court is referred to the separate heading on the subject, *infra.*

(p. 35) Respondent here refers to the issuance of $20,100 of Bridge Company bonds *"as collateral security for the payment of obligations originating with Phoenix Finance System, Inc. and to pay interest on fraudulent bonds and some other items found without consideration by the court on the original trial."* Such statement is misleading and untrue. These bonds were issued to Phoenix Finance Corporation *as collateral security only* for obligations originating solely with Phoenix Finance Corporation (F. R. 542). These obligations were evidenced by four promissory notes for $3,125, $2,000, (R. 419), $12,110.19 (R. 486) and $500 (R. 485) respectively, in all of which Phoenix Finance Corporation is payee. There is no pleading in the record attacking or describing these secondary obligations and in the Foreclosure Cause neither the Trustee Complainants nor Phoenix were purporting to assert or collect them, nor was the Bridge Company in any way called upon to defend against the claims thereof.

The record references given by respondent on this point do not establish the facts thus alleged. F. R. 1027-1029 are the minutes of Bridge Company directors' meetings of July 5 and 7, 1933. The July 7 minutes show that the $20,100 of bonds were authorized to be issued to Phoenix Finance Corporation "as collateral" to an authorized note for $12,110.19 "and other notes owing to the Phoenix

Finance Corporation by the Bridge Company". The board recognized outstanding obligations to Phoenix Finance Corporation as follows:

"On open account to June 30, 1933 and unpaid	$12,110.19 [3]
On notes to June 30, 1933 and unpaid	5,625.00" [4]

F. R. 203 (bottom) and 204 (top) cited by respondent are merely a part of the decree of December 1, 1936 in the Foreclosure Cause and are not helpful in establishing any *fact* in an ancillary proceeding where the original prevailing party has the burden of showing that it was a "right decree." In other words, this citation begs the whole point of the petitioner's alternative contention. In like manner, respondent cites F. R. 1704 (bottom) and 1705 (top) to prove this *factual* statement. This is simply a reference to the *opinion* of the Circuit Court of Appeals in the Foreclosure Cause. (As to the effect to be given an *opinion* of the Court in determining *res adjudicata,* see petitioner's brief, pp. 78-79.) It does not and cannot, in this ancillary proceeding where the decree is challenged as "wrong", establish a *fact. It is indeed significant that respondent is unable to cite a single* reference of fact to establish this contention.

(p. 35) Respondent gratuitously and without record references states: "The record shows that the Phoenix Finance Corporation took up the conspiracy where the Phoenix Finance System, Inc. left off". There is no evidence of any character to indicate any connection with any conspiracy or wrongdoing by Phoenix Finance Corporation.

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[3] The note for this amount was authorized at this meeting.
[4] These were the $3,125, $2,000 and $500 notes.

This is solely a creation of respondent's counsel, unsupported by the record.

(p. 36) Again, we find a total failure on the part of respondent to appreciate the legal effect of an ancillary and supplemental bill to implement and enlarge a former decree. The point is dismissed by respondent with this statement:

> "The court's original findings are fully sustained and are *res adjudicata* and we do not feel justified in pursuing the matter further."

From the very nature of this case, this is talk of the most specious character. In what category does respondent place the principle commonly known as "Lord Redesdale's Rule"? It recognizes no matter of *res adjudicata* in such a proceeding. The Bridge Company took "the risk of opening up" these very questions when it filed an Ancillary and Supplemental Bill to implement and enlarge a former decree.

Prior thereto, by the same counsel appearing in this court, Bridge Company had appeared generally in the Delaware suit, pleaded res adjudicata as a defense in each case and had actually tried one case solely on that issue. The filing of the Supplemental and Ancillary Bill was obviously an afterthought, when counsel after trying, briefing and arguing the Delaware case, came to realize that there was a grave question with respect to the scope and legal effect of any claimed adjudication against Phoenix arising from the decree in the Foreclosure Cause.

(p. 36) The respondent persists in its refusal to meet the issue with respect to the alleged non-production of its books by Phoenix Finance Corporation. The paragraph on this point is obviously recopied from a former brief and

no attempt is made to refute the factual statement (with record references) contained on pages 46 to 52 of petitioner's brief. *This is a basic misrepresentation of fact that has characterized the Foreclosure Cause in and since the hearing on the motion for modification.* It has been repeated and reiterated by counsel for the Bridge Company at every available opportunity in exactly the same language and with exactly the same supposed supporting references (references which deal with books of Phoenix Finance System, Inc., not required by the order (F. R. 93, 98)). At no time has the respondent been willing to meet the *facts* shown by the record as stated in petitioner's brief. *Accordingly, in this respect, the petitioner is justified in characterizing respondent's misstatement of facts as deliberate and wilfully intended to further the fraud already perpetrated* on the courts below (see also petitioner's brief, pp. 50-51).

(p. 37) Respondent says: "The *complainants* called John A. Thompson, president of *complainant,* Phoenix Finance Corporation * * *." Similar references to acts of *"complainants"* or "complainants' counsel" appear also on respondent's brief at p. 39 (two places), p. 40 (three places, 41, 54, 62 (footnote), 64 and 65. This is an obvious effort on the part of respondent to insinuate that Phoenix, which had been involuntarily impleaded as a *complainant,* participated at the trial and hearings of the Foreclosure Cause. In each place the word should correctly read "Trustee Complainants" or "Complainant Trustees" or "Complainant Trustees' counsel, Mr. Fowler" to distinguish the actual and indispensable complainants from the *formal* or *nominal* complainant, Phoenix Finance Corporation. If this correction were made there would then appear

to be no purpose for the statements or references at all. Accordingly petitioner feels justified in its accusation of a wilful attempt at deception on the part of respondent.

(pp. 51-52) Respondent has here referred to petitioner's Exhibit SC-106 (R. 584), the tender of evidence at the trial (R. 277-278) and petitioner's Exhibit SC-114 (R. 595-693) as "not a part of the record." True, these exhibits and tenders were *rejected* by the trial court, but the correctness of such rulings is a matter now before this court in determining (under petitioner's secondary contention) whether the petitioner, as the defendant to an Ancillary and Supplemental Bill to implement and enlarge a former decree is entitled to challenge such decree as "wrong." The evidence was offered in support of this contention and the rejected evidence is a part of the record in this appellate proceeding and relates to one of the principal questions for determination herein. Respondent seems to fail to grasp the proper scope of inquiries to be made in appellate proceedings.

(p. 55) Respondent states (without record references): "That said John A. Thompson, as shown by the evidence, moved said records to Florida." The obvious inference intended is that Mr. Thompson took the books out of the jurisdiction to avoid process with respect thereto. This is a most unfair insinuation, and is contrary to fact. The main office of Phoenix Finance Corporation was in St. Petersburg, Florida. The books were never in Des Moines, Iowa, until they were sent to Phoenix' branch office in that City pursuant to the order of April 24, 1934. After being kept at Des Moines for over a year for such use or inspection as interveners' counsel was entitled to make, but never in fact made, they were returned to the place where they

originated and permanently belonged, viz., St. Petersburg, Florida.

(pp. 59, 60) With respect again to the ever present issue of the alleged non-production of Phoenix' books, pursuant to order, respondent dismisses the comprehensive review of the facts stated on pp. 46 to 52 of petitioner's brief with the following:

> "That is a mere reargument of the petition for rehearing."

Perhaps such characterization is substantially accurate. *But that is just exactly what a defendant in such an ancillary proceeding to implement and enlarge a former decree may legally and properly insist upon.* The application of "Lord Redesdale's Rule" as above shown, necessarily comprehends a "reopening" or "rehearing" to ascertain the correctness of any challenged findings so that error or abuse, if any, may not be perpetuated and the Court not made "an instrument of injustice."

The statement of the respondent with respect to this subject in dealing with paragraph 43 of Phoenix' Answer and Counterclaim (p. 20, part of footnote 3) that "The record supports the court's finding * * *" does not, as herein and in petitioner's main brief (pp. 46-52) more fully discussed, bear the scrutiny of the record and is wholly unsupported by the record references cited. Evidence that the books were produced pursuant to the order was tendered (R. 276) and rejected by the Court (R. 287).

It is difficult to appreciate the motives actuating counsel in the deliberately false statement (p. 60) that "The fact is neither the books nor any entries therefrom were produced." The petitioner will welcome the opportunity at the proper time to fling this statement in the teeth of

counsel by positive proof that he received those copies, that those books were produced in strict compliance with the Court's order and that counsel failed to call at the place designated to examine them. The record references on this page, or any of them, do not, when scrutinized, support the allegations of respondent in this regard. They deceptively refer to books of Phoenix Finance System, Inc., which the Court refused to order produced (F. R. 92-96, 97-98) and they refer to the nonproduction *before the Master* whereas the Court ordered production at the *Phoenix office in Des Moines* (F. R. 98). The charge is and at all times has been a pure fabrication of counsel for the respondent and is fraudulent imposition upon the Court fortified only by the constant and persistent repetition thereof.

At the bottom of p. 59, respondent says that "Such production is claimed [by Phoenix] for the first time in this ancillary proceeding." This statement is wholly untrue. The question of alleged nonproduction was raised for the first time by motions and papers filed by interveners *at the hearing* on the motion for modification (F. R. 397) without prior notice to or opportunity on the part of Phoenix to answer the same. At that hearing (February 18, 1937), Phoenix orally resisted the charge. On appeal to the Circuit Court, the matter was briefed and again argued. The next opportunity was this Supplemental and Ancillary Proceeding. Phoenix has at every opportunity defended itself against this wholly unfounded charge.

(p. 64) On page 48 of petitioner's brief (including footnote 28, pages 48 and 49), petitioner has effectively demonstrated that the present contention that its legal debts and claims were adjudicated adversely to Phoenix in the Foreclosure Cause was an afterthought of counsel and not conceived to be the law at the hearings in that cause.

The petitioner points out stricken paragraph 40 of Phoenix' Answer and Counterclaim (R. 164-165) that—

> "In the said proceedings before the Master and on exceptions to the Master's report and at other times in the proceedings, counsel for the interveners [now counsel for the respondent] and counsel for the Bridge Company repeatedly asserted and represented that the indebtedness of the Bridge Company to any bondholder was not in issue and could not be adjudicated in such foreclosure proceedings."

This allegation presented as pleaded, a justiciable issue of fact. True, this allegation with others was stricken by the District Court. But this is one of the points implicit in the questions now before the court. Had the petitioner been permitted, it would have offered evidence to prove that allegation and such evidence would have taken the form of transcripts of arguments of, and quotations from, briefs filed by counsel for the intervener (the same counsel now appearing for respondent) and Bridge Company. At the trial below, counsel for respondent made the following presentation (R. 260):

> "Mr. Ontjes: * * * And we ask the Court, that, *without exception*, to take judicial notice of all the records, papers and files in this cause [the Foreclosure Cause] in connection therewith."

Such transcripts of arguments and briefs were a part of the "records, papers and files" so noticed. Consequently, petitioner is justified with respect to this stricken factual issue, in pointing out the *intrinsic* evidence in the case itself available to prove the point.[5] True, these briefs and transcripts

[5] In footnote 28, pages 48 and 49 of petitioner's brief, certain admissions were cited *by way of example only*. The transcripts of arguments and the briefs in the Foreclosure Cause furnish many additional items of evidential value in this connection which would have been offered if Phoenix had been permitted to

are not printed herein, but we are dealing primarily with the correctness of the ruling which eliminated the issue of fact thus tendered by pleading.[6]

(p. 65) Respondent here says that "trustees and Phoenix * * * continuously asserted that the considerations of the bonds were in issue and presented them as in issue." At p. 66, the same statement is substantially repeated. The facts are just the reverse. Phoenix made no assertion or presentation in this respect, except as hereinafter stated. Trustee's counsel, on the other hand, continuously contended that the bonds were not in issue and should not be proved or offered until the contemplated "second stage" (petitioner's brief, p. 15, footnote 13). The only

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prove its case under its alternative theory. In an affidavit made and filed by Intervener's counsel (same counsel now appearing for respondent) on August 17, 1934 in support of an amended and substituted petition for intervention, it was asserted by counsel that certain named *creditors* were "proper and necessary parties to a full and complete determination of the matters involved in this cause." The following, quoted from Mr. Ontjes' brief in support of the motion last above mentioned, might well have been written by counsel for petitioner. Therein, he said:

> "While it is the general rule that bondholders secured by deed of trust are assumed to be fairly represented by the trustees, in a case like this, where the question as to who are *bona fide* holders as to such bonds, is involved, the general rule would not apply and it is necessary that particular bondholders whose holdings are attacked should be made parties."

Of course, counsel in the foregoing did not classify or define the term "parties," but if it was "necessary" that the bondholders "should be made parties," it is a reasonable assumption that counsel meant that they should have the status of "indispensable parties" so as to support adjudications against them. As shown by petitioner's principal brief, this, as to Phoenix Finance Corporation, a Delaware corporation, would have defeated Federal jurisdiction (petitioner's brief, pp. 90-95). However, at a later point (F. R. 393), the same counsel apparently shifted his position and then claimed "That the Phoenix Finance Corporation was not a necessary or indispensable party, but merely a nominal or proper party * * *" and the Court so held (F. R. 211, 1692).

Intervener's brief on exceptions to the Master's report, p. 248, had further evidential value on this point:

> *"If any bondholder has any legitimate claim against the Bridge Company, he or she can sue at law subject to the defenses, set-offs and counterclaims of the Bridge Company."*

[6] If for any reason the Court should deem it material that such transcripts and briefs or relevant parts thereof be printed, the Court may make such order "as the circumstances may appear to the Court to require" (Rule 13 (9)). It was not felt by petitioner that these already voluminous records need be further enlarged as to this point. If the case goes back for a new trial under petitioner's alternative contention, a record will of necessity be made and preserved as to all of these prior admissions of counsel.

activity of moment of Mr. Sloan, Phoenix' counsel, an observer during the first or foreclosure stage of the proceedings, was to object to the introduction of bonds at that stage (F. R. 637). The Master so ruled (F. R. 637), saying: "*I think it is immaterial at this time.*"

Furthermore, at the close of the Mason City hearing before the Master, Mr. Ontjes moved for a decree "on the ground that the complainants have wholly failed to produce or account for the bonds in suit • • • ." (F. R. 691)

(p. 66, footnote 9) Respondent states: "What the Bridge Company's counsel stated in oral argument is immaterial since both the Court and the Master found that the Bridge Company was under the dominant control of John A. Thompson, president of Phoenix, and was not making a good faith defense • • •." The Bridge Company counsel who are quoted in footnote 28, page 49 of petitioner's brief were Messrs. Haehlen and Hart. Respondent conveniently overlooks the fact that both the Master and the court exonerated them from any charge or suggestion of domination (F. R. 134, 135, 161).

(p. 67) Petitioner concedes a printer's error with respect to the date, February *17*, 1937, as stated in the fourth line from the bottom of footnote 28 on page 49 of its brief. The date should have been February *18*, 1937. Because of this immaterial and wholly innocent mistake of *one day*, respondent says: "This is a deliberate misstatement of the record." However, in the same connection, respondent's brief contains an obvious printer's error which makes a mistake of *one year* in the sentence reading: "The hearing was had on the 18th day of February, *1938*." (8th line from bottom p. 67). The hearing was actually on February 18, *1937* (F. R. 411). This merely serves to illustrate the carelessness and intemperance with which respondent has dealt

with the record and petitioner's brief. Having made an innocent mistake of *one year* it is with poor grace that the respondent criticises petitioner for an equally innocent mistake of one day on a point of no materialty.

(p. 77) In the interest of accuracy and for the proper protection of its rights, Petitioner in this reply is constrained to call attention to the principal material misstatements of fact by respondent. This has necessitated much work and briefing which would not have been required if the zeal of respondent's counsel had not led him into continuous inaccuracies which can only, under the circumstances, have been wilfully intended. Thus at this page the bold statement is made that John A. Thompson "*was a witness on the part of Phoenix at the trial of this cause.*" As pointed out in Petitioner's Brief (pp. 17-21) Phoenix did not participate at the trial and offered no evidence of any character. *John A. Thompson was a witness for the intervener and the Trustee Complainants and the record references given by respondent for the above-quoted sentence and the sentence immediately preceding establish this fact.*

(p. 77—the John A. Thompson deposition) Here as elsewhere in respondent's brief are citations from this deposition. Beginning May 10, 1934, Mr. Thompson's deposition *as a witness on behalf of intervener* was taken before one H. L. Bump, Commissioner (F. R. 414-500). *The deposition was never read or offered in evidence by any party. It was not a part of the record before the Master or trial court.* However, after Phoenix' request for rehearing and modification had been denied and præcipe for appeal filed, the court ordered certain matter to be printed "for use in presentation of the question as to whether the trial court

arbitrarily and in abuse of discretion overruled appellants' motion for rehearing, *but for no other purpose*". The Thompson deposition was ordered printed at appellee's request "*as bearing upon the same subject*" (F. R. 216; motion of appellee therefor, F. R. 764).

In this deposition Mr. Thompson refused to answer certain questions, (for example, F. R. 428, 430, 433, 459, 477, 479, 498) which were clearly irrelevant to the issues and a part of a "fishing expedition" in aid of other litigation in which the Commissioner, as a practicing lawyer, had an interest (F. R. 421). Intervener thereupon applied to the District Court for the Southern District of Iowa, Central Division "for the issuance of a citation for contempt." (No. 886-Law; see also F. R. 499 referring thereto). District Judge Dewey on July 28, 1934 "Ordered that the application be denied and refused." *In other words Mr. Thompson's contention that the questions were irrelevant to the issues was, after hearing and argument, fully justified and sustained.*

(pp. 79, 80). Here respondent refers to the $50,000 mortgage as being "fraudulent, wholly without consideration and void" and the $35,000 and $15,000 checks evidencing loans secured thereby as being "endorsed by the bridge company without consideration and returned to Phoenix, issued in connection with the making of false entries." This is a typical example of the successful legerdemain by counsel for respondent which resulted in findings in the Foreclosure Cause adverse to Phoenix without supporting record evidence, and, in many instances, contrary to unimpeached record evidence. Because counsel *charged* it, the allegation was accepted as a fact without evidence and, since Phoenix offered no evidence, went substantially by default. Petitioners' secondary contention permits these

"wrong" and wholly unsupported findings to be challenged on the Ancillary and Supplemental Bill to implement and enlarge the Foreclosure Decree. At the trial below Phoenix offered its evidence (R. 278, 289) to show that the Bridge Company received this money. The evidence was rejected (R. 287, 290). It is significant that, although the trial court may have been imposed upon in this respect, the true facts were sufficiently apparent and established by the financial records of the transaction to enable a reputable auditing firm of the standing of Ernst & Ernst to certify thereto (Exhibit S. C. 114, R. 595-693 at pages 599 and 611).

(p. 93) Respondent here purports to quote from Master's Conclusions of law No. 5 in the Foreclosure Cause (F. R. 136). In this quotation appears the following: "• • • and *the Phoenix Finance showing* made in the first instance • • • ." Heretofore on at least two previous occasions in the course of this litigation, counsel for petitioner has had occasion, in answering or reply briefs, to direct the attention of both counsel and court to the error whereby respondent has persistently misquoted, as above, the phrase: "• • • and *the prima facie showing* made in the first instance". (F. R. 136, line 8). In fact in the Delaware case counsel for the Bridge Company, upon the matter being called to his attention, *stipulated* to the correction. It was originally thought that this was a wholly innocent error arising as a result of sound similarity in dictation. *Now counsel for petitioner is convinced that the error is and always has been deliberate and intentional and devised to make it appear that Phoenix did participate in the trial of the Foreclosure Cause by some "showing" of evidence.*

(p. 99) Respondent's statement that the court found in the Foreclosure Cause that Phoenix Finance System, Inc. (and through it Phoenix Finance Corporation) "had

become indebted to the bridge company in an amount of $26,085.85'' is not established by the findings cited, in that amount or in any amount (F. R. 193, 194, 202). Furthermore as to the $14,000 set-off or counterclaim (which respondent evidently intended as parcel of the above amount) it is pointed out in Petitioner's Brief (pp. 79-80) that there can be no justiciable set-off in the absence of appropriate pleading, and in Petitioner's Brief (pp. 90-95), that the Federal Court lacked jurisdiction to adjudicate a legal claim of this character between two Delaware corporations. In addition, petitioner challenges as ''wrong'' in this ancillary proceeding the finding to this effect. At the trial its tendered evidence was rejected by the court, as above shown.

(p. 103) Here respondent states that ''The Phoenix' *erroneous assertions* have made it necessary to unduly lengthen this brief by quotations from the record.'' Thereupon for the next twenty-four pages (pp. 103 to 127), respondent intermingles quotations from the two records and draws conclusions from other references in such a way as to be unintelligible and wholly confusing. *The findings in the case below are the very findings this court is asked to review. The findings in the Foreclosure Cause are challenged and one of the questions of law for this court to consider is whether the court below erred in refusing to permit petitioner to challenge those findings.* This portion of respondent's brief adds nothing to petitioner's statement, points out no error therein, is wholly surplusage, and is obviously designed to confuse the court as to the real issues of law presented. Respondent in this part of its brief quotes and argues at length from pleadings directed against *Phoenix Finance System, Inc.* and attempts (wholly futilely) to make it appear that such pleadings raise issues

against *Phoenix Finance Corporation.* At p. 105 the respondents' statement that Phoenix in any manner "took issue" with intervener's charges with respect to the 517 shares of "A" stock is wholly untrue and no record reference being cited therefor, should be ignored.

(pp. 113, 114, 115) With respect to the Financing Agreement (characterized by respondent as "the fraudulent guaranty agreement") in suit in Delaware (Exhibit S. C. 104, R. 522 *et seq;* Petitioner's Brief pp. 31-34) it is pointed out (at the expense of repetition) that this was a three-party contract between the Bridge Company, Phoenix Finance System, Inc., and John W. Shaffer & Co. (F. R. 1393). Phoenix Finance System, Inc., was never in court in the Foreclosure Cause. Service as to it was quashed (F. R. 99, 109, see Marshal's return, F. R. 89). No attempt was made to implead Shaffer & Co. and that corporation nowhere appears in the case as a party of any grade. Admittedly, even Phoenix Finance Corporation was only a "formal" or "nominal" party. It is inconceivable under any theory, known or suggested, how a valid adjudication nullifying the contract as "fraudulent" could be made in a suit to foreclose an entirely unrelated trust indenture and to which two of the contracting parties were in no way litigating parties. However, and quite apart from the technical pleading and issue aspect, any finding on this point is challenged by petitioner as "wrong" in this ancillary proceeding, and, under petitioner's alternative contention, it is submitted, this challenge should be recognized and the defense (not offered or proper to be offered in the Foreclosure Cause) admitted. Petitioner's tendered evidence at the trial of this ancillary cause was rejected, as heretofore shown.

The Alleged Control of Bridge Company by the So-called Phoenix Group.

On page 54 of petitioner's brief, it was stated with respect to the factual issues, in the event this case is remanded for retrial under petitioner's alternative contention—

> "A discussion as to what those facts are specifically and what detailed evidence is available to prove or disprove the same has no place on this writ of certiorari."

In a footnote (29, p. 54), petitioner gives an outstanding example of a "wrong" finding of fact in the Foreclosure Cause which will be controverted if that case be "reopened" by the application of "Lord Redesdale's Rule." The factual point was not deemed proper for major consideration at this stage and for that reason was stated in a footnote.

However, respondent's brief at various points and particularly by elaborate notes on pages 68 and 69, seeks to establish affirmatively and as a fact that there was an interlocking directorate exercising domination and control over the Bridge Company at the time the trust indenture, the bonds, and other obligations were authorized and issued.

In view of respondent's repeated reference to *Geddes v. Anaconda Mining Co.*, 254 U. S. 590 (brief, pp. 107, 141, 161), and the argument therefrom that the alleged common directorate is in itself a badge of fraud, the petitioner now deems it advisable and necessary, even at the expense of a substantial extension of this reply brief, that the record on this point be reviewed and accurately analyzed.

It must be borne in mind, in a consideration of this problem, that the "control" contended by Respondent was

an alleged *improper* control or control for an *improper* purpose. At every corporate stockholders' meeting there is majority voting in the election of directors and with respect to matters of corporate business and policy. It is an improper implication to say that such majority, be it a person or group of persons, thus "controlled" the corporation in any unlawful or presumptively fraudulent sense. Furthermore persons or groups holding and voting proxies only do so by reason of voluntarily conferred and revocable powers of attorney which are only given when a stockholder has confidence in his designated agent and has voluntarily determined that his stock should be voted on some corporate issue of which he has had due notice in a predetermined manner. If proxy holders have sufficient stock and proxies to determine a given corporate election or issue, this is not "control" in the sense intended by Respondent. We are here concerned solely with alleged control by an interlocking directorate of two corporations having business relations with each other which (with respect to the corporation benefiting thereby at the expense of the other) would be an improper control or a control for an improper purpose. *No "control" in this sense existed at any time, as herein more fully demonstrated.*

Phoenix Finance System, Inc.

John A. Thompson and wife owned together a total of 11¾% of the total voting stock of Phoenix Finance System, Inc. (F. R. 355). The balance of over 88% was held by 573 stockholders scattered over thirteen states (F. R. 355). The total amount of the capital stock of Phoenix Finance System owned by all persons who were ever officers and directors of the Bridge Company was less than 26% (F. R.

355). Phoenix Finance System had a board of thirteen directors from and after February 11, 1931 (F. R. 636), and throughout the period during which it had any connection with the Bridge Company. John A. Thompson did not control Phoenix Finance System, Inc. through stock ownership, and he did not and could not have dominated and controlled its officers and directors (F. R. 356, 255, 282, 287, 291, 303, 377). Thompson & Co. was a wholly owned subsidiary of Phoenix Finance System, Inc. (F. R. 558).

Phoenix Finance Corporation.

There were no pleadings of any kind as to Phoenix Finance Corporation but as to that corporation John A. Thompson testified that "the combined stockholdings of Mrs. Thompson and myself and Mr. Wilder and Mr. English during the years 1932, 1933 and 1934 would have been more than fifty-one per cent. of the total common stock" (F. R. 674). Phoenix Finance Corporation was incorporated December 29, 1931 (F. R. 542). Mr. Wilder died in 1935 and had been a stockholder of Phoenix Finance Corporation to the extent of $150,000 (F. R. 674). Mr. and Mrs. Thompson together at the *highest* point of their stock ownership lacked fifty shares for voting control (F. R. 673). Emory H. English stated that he had an investment in Phoenix Finance System, Inc. and Phoenix Finance Corporation of approximately $15,000, that "he owed no obligation of any kind to John A. Thompson", and that he was never a "tool or strawman or dummy director for John A. Thompson or anybody else" (F. R. 264). Mr. English further stated (F. R. 265):

> "I attended many stockholders and directors meetings of Phoenix Finance System, Inc., and Phoenix Finance Corporation and it was a uniform experience

in those meetings that they were conducted fairly and without the employment of tactics that would preclude the exercise of private initiative and independent judgment on the part of the directors.

"John A. Thompson's incumbency in the office of president was the result of the choice made by the directors of the Company and not as a result of any compulsion to do so because of his stock ownership."

The board of directors of Phoenix Finance Corporation were three in number from December 29, 1931 (the date of incorporation) to February, 1932 (F. R. 636). The first three incorporators were "Joseph S. Hatch and two of his associates in Wilmington, Delaware" (F. R. 435). After February, 1932, and during the balance of the critical period the directors were twelve in number (named in F. R. 1385; see also F. R. 636, 637). Nine affidavits in the Foreclosure Record denied that there was at any time any domination, control or coercion of these directors by John A. Thompson or anyone else (F. R. 255, 264, 265, 282, 286, 291, 303, 339, 355, 377).

The Bridge Company trust deed and bond issue was authorized at a special meeting of the stockholders held on December 22, 1931 (F. R. 946, 952, 953), prior to the incorporation of Phoenix Finance Corporation (F. R. 542). The bonds were dated January 1, 1932 (Exhibit 2 (HEB), F. R. 775). *This was prior to the election of the twelve member board above mentioned and prior to any of those persons becoming directors of Phoenix Finance Corporation.*

Iowa-Wisconsin Bridge Company.

In the Foreclosure Cause, the Master found (F. R. 129) and the Court approved (F. R. 179, 180) the following alleged facts:

"4 (a). That John A. Thompson, above named, before the issuance of the said bonds and before the authorization of the said trust deed, came into the control and management of the defendant, Bridge Company, either directly or through the Standard Shares Holding Company.

(See deposition of V. W. O'Connor, pages 4-6; testimony T. H. Bakewell and admissions of John A. Thompson on cross-examination, Mason City; deposition John W. Shaffer, pages 79-81; stock record of Iowa-Wisconsin Bridge Company and stock certificate books of Iowa-Wisconsin Bridge Company; testimony of M. White, pages 23MM to 25MM; O'Connor deposition, pages 11-23; deposition of A. B. Wilder, page 2; deposition Oscar R. Thorson, pages 3 to 17; M. White, page 10MM; Minute book, Iowa-Wisconsin Bridge Company; Shaffer deposition, p. 5 and top of p. 6; White deposition, Int. 164-167; M. White deposition, pp. 16MM to 22MM).

(b) That during all that time and during the times hereinafter named, the said Thompson also controlled the Phoenix Finance System, Inc., and other affiliated Companies.

(See deposition of Thompson taken at Des Moines and Mason City; deposition of M. White; testimony of T. H. Bakewell, trial at Mason City; O'Connor deposition, pp. 4-6 and 11-17; White deposition, pp. 72MM-77MM; Journal Iowa Bridge Company, p. 58, lines 9-11; Thompson, while testifying, in effect conceded that during the time named he controlled the Phoenix Finance System, Inc., and he and his associates could control the defendant, Bridge Company)."

There is not a single record reference thus given by the Master which properly supports those findings. A detailed analysis of each record reference would involve prohibitive space in this reply brief, and *petitioner contents itself with*

the confident assertion that there is an utter dearth of competent record evidence to support the findings above quoted. By the application of "Lord Redesdale's Rule" under petitioner's alternative contention, and when and if the foreclosure decree is "re-opened" for challenge and judicial scrutiny, an opportunity will be presented to petitioner to make an exhaustive analysis of the existing record as well as to present *its own evidence* with respect thereto.

It was just such findings as these that induced Phoenix Finance Corporation to petition for a rehearing which would have enabled it to point out the incorrectness thereof and to introduce on its own behalf even more conclusive evidence than is actually in the record, to prove the contrary. The rehearing or requested modification was denied *solely* because of the fraudulent imposition upon the court by counsel for the intervener (now counsel for the respondent) of the utterly false charge that Phoenix had refused to produce books pursuant to a court order (see petitioner's brief, pp. 46-52).

On the other hand, the record actually made in the Foreclosure Cause (without any evidence by Phoenix) *affirmatively disproves* the findings. As to the ownership of stock qualified to vote at the Bridge Company stockholders' meetings during the critical period, John A. Thompson, M. K. Thompson (his wife), A. B. Wilder, Emory H. English, M. White, Thompson & Co., Phoenix Finance System, Inc., and Phoenix Finance Corporation together owned only the following percentages (F. R. 311, 1036, 1301):

November 11, 1930	—3%
March 10, 1931	—36.7%
December 22, 1931	—18.5%
March 8, 1932	—22.6%
July 8, 1933	—24%

This assumes for the purpose of argument that Mr. Thompson directly or indirectly exerted a measure of control over Messrs. Wilder and English and over Thompson & Co. and Phoenix Finance System, *an assumed situation which is not a fact.* (F. R. 231, 264, 265, 266, 282, 290, 339, 372, 379, 630, 631).

This establishes the fact that no control existed by virtue of majority stock ownership. However the respondent says (brief p. 68, footnote 10):

> "Petitioner makes no reference to evidence before the Master, and the court, showing proxies procured and held in the names of persons under the control of said John A. Thompson and associates of Phoenix, nor to the evidence showing their control of other directors of the Bridge Company."

A complete answer to any inference of improper control for any purpose or exercised in any manner will appear in the following resume of facts.

The November 11, 1930, meeting of Bridge Company stockholders was adjournred to November 26, 1930, after the election of directors (F. R. 869, 871, 876). Being an adjourned meeting, the shares qualified to vote were necessarily determined as of the original meeting date. At the adjourned meeting on November 26, 1930, contracts vital to this case were approved and authorized, including the Financing Agreement between Bridge Company, Phoenix Finance System, Inc., and John W. Shaffer & Co. (R. 540) and the Superstructure Contracts which brought about Phoenix Finance System's "guarantees" under the Financing Agreement for bridge construction payments. The cash loans evidenced by the notes and contracts in suit in Delaware and the $50,000 mortgage (with its underlying in-

debtedness of the amount and the additional advance of $9,000) were all the result of and interdependent upon the contracts so authorized and approved. Therefore, the question whether the so-called Phoenix groups (meaning thereby, for purpose of argument only, the individuals and corporations above mentioned) controlled or dominated this meeting may have been considered a question of some importance in the Foreclosure Cause.

As above shown, the so-called Phoenix group owned but 3% of the then outstanding stock qualified to vote. *However, the significant fact is that the Phoenix group did not in person or by proxy vote a single share of stock either for the election of directors on November 11 or for the approval of said contracts at the adjourned November 26, 1930 meeting* (F. R. 865, 877). Furthermore this was an annual meeting with full notice and the old board was reelected by unanimous vote without dissent or objection (F. R. 868).

Notwithstanding the foregoing and the fact that counsel for respondent has had this matter called to his attention repeatedly, he deliberately persists in false and untrue implications in this respect. The following is taken from respondent's brief (p. 69, footnote 10):

> "On November 26, 1930, Thompson & Company, a wholly owned subsidiary of Phoenix (F. R. 545), John A. Thompson and A. B. Wilder held 1834 voting shares, more than one-half of the total voting stock authorized. 1800 shares of this had been issued to Shaffer & Company on that date and immediately transferred to Thompson & Company. (F. R. 596, 1305, 1335)"

Shaffer & Company received the 1800 shares after the November 26, 1930, meeting and in pursuance of the contract approved thereat (F. R. 879, 596). *No part of the*

1834 shares participated in any manner at the meeting of November 11, 1930, or at the adjourned meeting of November 26, 1930. This is a typical example of the manner in which counsel for respondent, throughout the various stages of the case, has imposed upon the Court. The implications counsel obviously intended the court to draw from the above quoted paragraph and the implication the court would necessarily draw therefrom, were it not otherwise explained, are that the so-called Phoenix group controlled and dominated the meetings of November 11, 1930, and November 26, 1930. As above shown, this is not a fact, and counsel's insinuation in this respect can only be characterized as a wilful effort improperly further to deceive, influence and impose upon the court. Otherwise it is impossible to understand the purpose for which this paragraph was written.

The attention of the court in this connection is called to the fact that the applicable section of the Delaware Corporation Law, then in force, prohibited the voting of shares "transferred on the books of the corporation within twenty days next preceding such election."[7]

Respondent further states (footnote 10, p. 69) that:

> "At the meetings on November 11 and November 26, 1930, 1500 shares were voted by Shaffer, as president of Standard Shares Holding Company, which was controlled by him, and 664 shares by V. M. O'Connor."

This may be true, but what does it prove? There is not a scintilla of evidence that Thompson or any Phoenix com-

[7] 1931 Sec. 17, Revised Code, Delaware, 1915:
Voting Power of Stockholders; by Proxy; Limitation of:—Unless otherwise provided in the charter, certificate or by-laws of the corporation, each stockholder, whether resident or non-resident, shall at every meeting of the stockholders be entitled to one vote in person or by proxy for each share of the capital stock held by him, but no proxy shall be voted on after three years from its date; *nor shall any share of the stock be voted on at any election which has been transferred on the books of the corporation within twenty days next preceding such election.*

pany had any control over, or identity of interest with, Standard Shares Holding Company [8] or that Mr. O'Connor or Mr. Shaffer had any connection with the so-called Phoenix group. Such is not the fact, and there is nothing in the record to so indicate, directly or inferentially. In fact the record proves the contrary (F. R. 680, 339, 343, 355, 382, 447).

The only proxies voted at the meetings of November 11, 1930 and November 26, 1930 were the 664 shares represented by O'Connor (F. R. 865-867, 877). Respondent says (footnote 10, p. 68):

> "John W. Shaffer and Vernon W. O'Connor were promoters of the Bridge Company and John A. Thompson acquired control through them about November 1, 1930."

This is a gratuitous statement advanced without the slightest supporting evidence and is wholly untrue.[9] (See F. R. 261, 299, 339, 342, 390). O'Connor never met Thompson until November, 1930 (F. R. 448, 637). O'Connor says he did not vote his shares for the bond issue at the meeting of December 22, 1931 (R. 647). He had personal interests opposed to Phoenix (F. R. 353, 643, 647, 856). He was never dominated or controlled by Mr. Thompson (F. R. 257, 299, 346, 365, 380, 390).

Respondent also gratuitously asserts (footnote 10, p. 68) that: "John A. Thompson, with his wife, M. K. Thompson, and his associates, A. B. Wilder and Emory H. English, controlled Phoenix." *No record references are cited*

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[8] This is confidently and vigorously inserted notwithstanding finding 4 (a) above quoted (F. R. 129).

[9] Even the Master in his recital of historical facts (not findings) merely states (F. R. 123) that "Thompson *is said* to have acquired control of the stock in the Bridge Company" as the result of negotiations with Shaffer and O'Connor. *This was said* by interveners *but never proved*, and such is not the fact.

for this statement and none exist. As above shown, the statement is a pure fabrication, but even if it had been true Phoenix in turn, as herein shown, did not control the Bridge Company, because the combination of the Phoenix corporations and the individuals (including M. White and Mr. and Mrs. Thompson) never at any time had a majority stock interest (F. R. 311, 287, 339, 343, 356, 364, 390, 391, 1305, 1309, 1311).

Again respondent (footnote 10, p. 68) insinuates that Oscar R. Thorson, who became a director and secretary-treasurer of the Bridge Company November 26, 1930 (F. R. 548, 608, 881) was under the control and domination of John A. Thompson, who had become a director and president of the Bridge Company on November 1, 1930 (F. R. 862). At p. 81, footnote 15, respondent boldly calls Mr. Thorson "his employee". Mr. Thorson was a salaried full-time officer and the general manager of the Bridge operations (F. R. 347, 921). He was not an officer, director, stockholder or employee of Phoenix Finance System, Inc., Phoenix Finance Corporation or Thompson & Co., and had no interest in or connection with the so-called Phoenix group or any of the individuals connected therewith (F. R. 279, 281, 290, 339, 347, 380-381, 543, 548, 614, 626, 641). He was never dominated or controlled by anyone (F. R. 347). He first met Mr. Thompson about November 1, 1930 (F. R. 608).

Mr. Thorson himself stated (F. R. 348):

> "That throughout the entire period that I was associated with said Bridge Company as above described I always acted in good faith, was not in any way interfered with in the free exercise of my duties as an officer and director of the Bridge Company. That in every instance my approval and vote represented my own personal judgment and conviction."

Mr. Thompson testified that Mr. Thorson had no connection with Phoenix (F. R. 543). Emory H. English, A. B. Wilder and Vernon W. O'Connor testified to like effect (F. R. 614, 626, 641). Mr. Thorson testified that he was not consulted about becoming a director prior to his election, and with respect thereto further said that he had no talk with Mr. Thompson on that subject and that he saw Thompson but infrequently (F. R. 608). It is worthy of note that this is the same Oscar R. Thorson who has served the court as its Receiver in this case for the past seven years (F. R. 69).

The stockholders' meeting of December 22, 1931, is the crucial point to ascertain the facts with respect to control and domination of the Bridge Company. Respondent has stated (footnote 10, p. 69) that "John *A*. Thompson by proxy and in person, Oscar R. Thorson by proxy and in person, Mrs. John A. Thompson, and M. White, John A. Thompson's secretary, voted 1709 shares, or more than half the stock represented in person and by proxy." Here again, with his intimate knowledge of the facts, counsel has indulged in another deliberate and wilful attempt to deceive the court. The record shows that Oscar R. Thorson, John *H*. Thompson and Emory H. English were named in proxies for 1,020 shares voted at the meeting (F. R. 947-949). John *H*. Thompson individually and by proxy voted 24 shares (F. R. 951). John *A*. Thompson voted 642 shares (F. R. 957, 958).

John *A*. and John *H*. Thompson are two distinct persons, not related, had no business or other connections, and were not even acquainted prior to November, 1930 (F. R. 364). John *H*. Thompson was a banker in Lansing, Iowa, had a financial interest himself in the company, and

was in no way controlled by John *A.* Thompson (F. R. 231, 279, 339, 364, 381).

At the date of the December 22, 1931, Bridge Company stockholders' meeting, there were 3,750 voting shares issued and outstanding (F. R. 311, 591). The record of stockholders present in person or by proxy is shown by the minutes (F. R. 946-959). 184 stockholders voted 2273 shares *for* the bond issue (F. R. 954). 30 stockholders voted 335 shares *against* the bond issue (F. R. 958). The affirmative vote *for* the issue was 87% of the shares present. 1579 shares were voted for the issue exclusive of shares owned by Phoenix Finance System, Inc. (500 shares), John A. Thompson (137 shares), M. K. Thompson (20 shares), Emory H. English (1 share), M. White (18 shares), A. B. Wilder (18 shares), a total of 694 shares. 1914 shares exclusive of so-called Phoenix group, or a majority of the shares issued and outstanding, were present for the purpose of quorum. The affirmative vote *for* the bond issue may be further analyzed as follows (F. R. 947-958):

By joint proxy to Oscar R. Thorson John *H.* Thompson and Emory H. English	1,020 shares
By proxy to John *H.* Thompson	23 "
By proxy to John *A.* Thompson (including shares of Phoenix Finance System, 500 shares and Sven S. Norling 5 shares	505 "
By John A. Thompson in person	137 "
Other individual stockholders in person	588 "
Total	2,273 "

It is to be noted that the notice of meeting (F. R. 959-960) and the form of proxy (F. R. 960-961) give complete information to stockholders with respect to the proposed bond issue to be voted upon at the impending meeting.

In petitioner's principal brief (pp. 54, 55, footnote 29) it is pointed out that at no time during the period in question were there ever more than four out of eleven directors, (only 2 out of 11 during the most critical period) participating in any Bridge Company meeting who had any connection with the so-called Phoenix group. From November 1, 1930, to September 25, 1933 (date of receivership) twenty-six persons served from time to time as directors of the Bridge Company. A. M. Nystrom was elected on March 10, 1931, but never served or participated in a meeting and resigned May 4, 1931. As to the other twenty-five active directors, the evidence is conclusive that at no time were they ever under any improper control or domination of Phoenix Finance System, Inc., Phoenix Finance Corporation, John A. Thompson, or any associate. Specifically this appears in the following:

1. T. H. Bakewell (an Intervenor in this cause F. R. 104) (F. R. 231, 242, 247, 262, 265-267, 271, 279, 283, 339, 343, 347, 353, 365, 368. See also 687-688 indicating "harmony," not "control").
2. Harold Bohn (F. R. 262, 279, 339, 343, 347, 368).
3. J. W. Dempsey (F. R. 231, 242, 262, 265-267, 279, 283, 339, 342, 347, 351, 353, 365, 368, 687-688).
4. N. W. Ellsberg (F. R. 262, 279, 339, 343, 347, 368, 629).
5. H. G. Foote (F. R. 265-267, 279, 339, 365, 368, 687-688).

6. H. W. Gaunitz (F. R. 265-267, 269, 279, 280, 339, 368, 379).
7. C. F. Fish (F. R. 265-267, 268, 279, 280, 339, 368, 379).
8. F. Hartman (F. R. 265-267, 269, 279, 280, 339, 368, 379).
9. H. Haehlen (F. R. 265-267, 269, 279, 280, 339, 365, 368, 379).
10. G. W. Huntley (F. R. 265-267, 269, 279, 280, 339, 368, 379).
11. M. E. Lockhart (F. R. 262, 279, 339, 343, 368, 347). Resigned 11-26-30 (F. R. 881).
12. F. J. Natchtvey (F. R. 265-267, 279, 339, 365, 368).
13. Edward O'Connor (F. R. 262, 265, 279, 343, 347, 339, 368).
14. V. W. O'Connor (F. R. 262, 265-267, 279, 283, 339, 343, 347, 353, 365, 368, 370). First met J. A. T. Oct. 1930 (F. R. 638).
15. H. A. Schremser (F. R. 265-267, 279, 339, 365, 368, 687, 688).
16. O. R. Thorson (F. R. 231, 262, 265-267, 279, 281, 283, 290, 339, 347, 365, 368, 380, 608, 881). Not connected with Phoenix (F. R. 543, 548, 614, 629, 291).
17. John H. Thompson (F. R. 231, 265-267, 279, 339, 351, 364, 368, 380, 548, 687, 688, 921).
18. C. H. Young (F. R. 262, 390, 279, 339, 343, 347, 368, 626).
19. H. T. Wagner (F. R. 231, 262, 265, 270, 279, 280, 290, 339, 343, 347, 365, 368, 379, 547). Dfts. Answer (F. R. 65) states new Board 7-8-33.

Wagner was one of them (F. R. 1041). Not connected with Phoenix (F. R. 265, 279, 368, 674, 290).

20. D. F. Wolfe (F. R. 265-267, 269, 279, 280, 339, 378).
21. E. H. English (F. R. 231, 264, 266, 265, 291, 339, 365, 368). Not connected with Phoenix when testimony given (F. R. 267).
22. M. White (F. R. 231, 265-267, 339, 365, 368). Participated in only two directors' meetings (See Ex. 6 HLB (F. R. 861)). Not employed by Phoenix when testifying (F. R. 456).
23. A. B. Wilder (F. R. 231, 262, 265-267, 282, 290, 339, 343, 367, 372, 379). Was a banker (F. R. 630).
24. John A. Thompson (F. R 231, 262, 266, 343, 282, 291, 339, 367, 368).
25. M. K. Thompson (F. R. 265-267, 339). Never participated as director until March 7, 1932 (Minute book, F. R. 861 *et seq.*).

It is emphasized that any stockholders' meeting of which there was due notice as to the purposes, and where stockholders, in pursuance to such notice have executed and returned proper proxies, and have made no complaint with respect to the voting thereof, (as in the instant case), it is but idle talk of no legal significance to say that the proxy holder or holders *controlled* the meeting. Any person or group of persons having a sufficient number of votes in person or by proxy at any corporate stockholders' meeting may *control* that meeting. In the same manner, counsel for the respondent and his associates now *control* the Bridge Company. When the stockholders lose confidence in the persons soliciting proxies, they will not give them. Where stock-

holders do not give a proxy or attend in person, they cannot be heard to complain.

The respondent (p. 69, footnote 10) refers to the fact that at the meeting of July 8, 1933, 1415 shares by proxy were not permitted to vote. This was because "of the by-laws requiring proxies to be filed with the Secretary of the corporation at least five days before the meeting" (F. R. 1038, 1039). Furthermore the meeting elected a new board of seven members *no one of whom had any Phoenix association* (F. R. 1041) and still more important there was no transaction after July 8, 1933 involved in this litigation.

The petitioner recognizes that as to disputed facts upon which there is conflicting evidence, the findings of the trial court are ordinarily not subject to review. Of course, there is the exception in the case of an ancillary proceeding to implement and enlarge a former decree (petitioner's secondary or alternative contention). *In the foregoing, however, petitioner has stated only facts that are uncontroverted on the record by even a scintilla of evidence.*

REPLY TO RESPONDENT'S ARGUMENT.

A.

Respondent's Argument With Respect to Petitioner's Primary Contention.

(Points I to VI; Petitioner's Brief, pp. 63-96; Respondent's Brief, pp. 128-200.)

As herein summarized, *Petitioner's Primary Contention is that the decree in the Foreclosure Cause did not constitute a valid adjudication against Phoenix with respect to Phoenix' choses in action mentioned in the Supplemental and Ancillary Cause.* The several points of law underlying this contention are Points I to VI of petitioner's brief.

Point I is the *premise*, viz., that the problem is to be *approached and tested* by an examination of the legal principles relating to the defense of *res adjudicata* and relating to the application of the "Full Faith and Credit Clause." Accordingly, a complete lack of understanding is evidenced by respondent when it is stated (p. 128) that "The writ does not involve the question whether the Federal Court gave full faith and credit to the decisions of another court." *The question is whether the decree of December 1, 1936 in the Foreclosure Cause is entitled to full faith and credit in another court.* The Delaware Court has answered this question in the negative.

Phoenix Finance Corporation v. Iowa-Wisconsin Bridge Company, 14 Atl. (2d) 386.

On the other hand, the court below by enjoining prosecution of the Delaware actions answered the question in the affirmative. Petitioner has no criticism of the legal principles stated at this point of respondent's brief (pp. 128-130) but, for the reasons herein stated, the same can have no possible application to the problem before the Supreme Court.

Point II of respondent's brief (pp. 131-180) is respondent's argument with respect to identity of parties and issues and the doctrine of representation. Petitioner's brief (pp. 66-84) deals with the same points and further discussion is deemed unnecessary.

Petitioner does not challenge the correctness of the doctrine of *Plumb v. Crane, Adm.*, 123 U. S. 560. That case merely holds that where an unnamed party is represented by his trustee in the conduct of litigation, such unnamed *cestui* is bound *by the decree therein*. Thus, in the Foreclosure Cause (subject always to petitioner's alternative contention with respect to "Lord Redesdale's Rule" in its application to an ancillary proceeding to implement and enlarge a former decree), Phoenix, a bondholder, being represented by the Trustee Complainants, was bound by the decree *denying foreclosure*. The effect of the decree must of necessity be limited to the issues and relief prayed.

Respondent has wholly failed to answer petitioner's position that the purported adjudications of Phoenix' contract claims against Bridge Company, and Bridge Company's claims (if any) against Phoenix *were not within the issues* of a bill in equity brought by the trustees of a mortgage deed of trust to foreclose the same with respect to mortgaged property within the jurisdiction of the court. As to practice, procedure and a determination as to the proper *scope* of such a proceeding, respondent and petitioner appear to agree that Iowa law and decisions have persuasive application.

It is emphasized that for a determination of the *subject matter* of litigation, it is first necessary to examine the *prayers* of the moving pleading. Thus, in the recent Iowa case of *Federal Land Bank of Omaha v. Jefferson* (decided January 21, 1941), 295 N. W. 855, the court said (p. 857):

> "* * * However, it is necessary not only for the court to have jurisdiction of the parties, but also jurisdiction of the subject matter, and even though the court has jurisdiction of the parties, if it has no jurisdiction of the subject matter, it has nothing before it to determine. (citing cases)
>
> "In determining what constitutes the subject matter of the litigation, it is necessary to examine the prayer of the plaintiff's petition. This court has repeatedly recognized that the relief to be afforded is limited by the prayer of a petition." (citing cases)

The court also quoted from the Iowa Code as follows:

> "* * * The judgment in rem is measured by the property in court."

The *Jefferson* case has a three-fold significance with respect to petitioner's argument because—

First—the Iowa rule that one need not fear a pleading in which there is no prayer affecting his legal rights, is further justification for the acceptance by W. B. Sloan, Esquire, attorney for Phoenix Finance Corporation, of the "two-stage"-theory of the parties (see petitioner's brief pp. 14-17; 83-84).

Second—the mortgage foreclosure proceeding, being *in rem* or *quasi in rem* (*Ingram v. Jones*, 47 F. (2d) 135, 140; *Wilson v. Alliance Life Ins. Co.*, 108 F. (2d) 150, 152; *Bride et al. v. Stormer, et al*, 291 Ill. App. 502, 10 N. E. (2d) 208, 209) there properly could not have been, and there was not in fact, any pleading or prayer for *personal* relief against Phoenix Finance Corporation. Accordingly by the applicable Iowa procedural law, there could not have been a *personal* adjudication against Phoenix with respect to the issues of the Delaware cases or with respect to the

issues implicit in an assertion of the $50,000 mortgage or the $50,000 note and $9,000 open account secured thereby.

Third—All the cases cited by respondent (both state and Federal) relate to adjudications responsive to pleaded issues and responsive to affirmative prayers for relief. Therein lies the fundamental distinction between petitioner's and respondent's respective arguments and the essential difference in this respect between the *Plumb* case, *supra,* and the *Jefferson* case, *supra,* serves as an effective illustration.

If respondent is to be construed as contending that there were intervener's pleadings and prayers in the Foreclosure Cause against *Phoenix Finance System, Inc.,* the obvious answer is that *System* was not in court and that process as to it had been quashed (F. R. 99-109). The argument herein stated is, of course, quite apart from petitioner's alternative or secondary contention and quite apart from Point VI of petitioner's brief (pp. 90-95) to the effect that even if there had been pleaded issues and prayers for relief against Phoenix, and even if Phoenix had had the status of a party against whom such adjudications could be made in a mortgage foreclosure suit, there could not, in this regard, have been Federal jurisdiction because of the lack of necessary diversity of citizenship as between the opposed parties.

In the case of *Thomas v. Brownsville etc. R. Co.,* 109 U. S. 522, cited by both petitioner (p. 96) and respondent (pp. 142, 155), there was a mortgage foreclosure suit brought by the Trustee under the indenture. The mortgagor was the original defendant. A decree of foreclosure was made and sale was had. At a later stage, stockholders of the mortgagor voluntarily petitioned for interven-

tion and were made parties defendant. These parties defendant thereupon filed an answer and *cross bill* praying that a certain construction contract on account of which the mortgage bonds were issued, the bonds so issued, and the mortgage securing the same, be avoided for fraud and the foreclosure decree vacated. The allegations of fraud in pursuance of the pleaded issues and prayer for relief were "proved beyond question" (p. 524). The court thereupon vacated the decree and dismissed the bill.

On appeal, the question was whether the trustee complainant should be permitted "to recover such a sum as the construction company actually earned in building the road" (p. 525) i. e., upon a *quantum meruit*. The Supreme Court pointed out that although the intervening stockholders "were not parties to the original suit" (p. 526), by permission they "were allowed to come in and contest the validity of the mortgage" (p. 526), and that by so doing and by filing their *cross bill* "they became actors" (p. 526). In this connection, this court said (p. 526):

> "In this condition of the case they are amenable to the rule that they who seek equity must do equity. It is just that they should pay a fair price for what they have received; that this mortgage, given for the construction of the road, though excessive by reason of the fraud in the contract, should stand for the reasonable value of what the company actually received in the way of construction. To permit these interveners to defeat the mortgage on any other terms would be unjust and would make the court the instrument of this injustice."

It will thus be seen that in the *Thomas* case, there was not presented the primary problem of the case *sub judice*, viz., the legal effect of a purported adjudication against

a bondholder in a foreclosure suit to which it was but a "formal" party, with respect to issues not involved in the *in rem* or *quasi in rem* proceeding of mortgage foreclosure. Furthermore, such issues as were decided were in pursuance of a *cross bill praying for the affirmative relief of cancellation.* Thereby an issue was framed to which the bondholder was an indispensable party and (so far as appears) Federal jurisdiction as to this issue existed.

However, the *Thomas* case does have relevancy in this case, particularly with respect to the right of Phoenix to obtain the reissuance to it of 517 shares of Bridge Company "A" stock which it had traded for bonds. In the Delaware Court of Chancery, Phoenix is seeking relief with respect thereto (see petitioner's brief, pp. 27-30). That being a matter concerning the internal affairs of a Delaware corporation, the Delaware Court only (and under no circumstances the Federal District Court in Iowa) has jurisdiction thereof (see petitioner's brief, pp. 80-83). The respondent has made no attempt to answer this section of petitioner's brief.

Under the doctrine of the *Thomas* case, petitioner contends however, that it is entitled to recover in courts of competent jurisdiction its entire advances to Bridge Company of $98,346 plus interest (petitioner's brief, pp. 43-44; Exhibit SC-114, R. 595-693) in addition to the said 517 shares of stock. *All the Delaware suits are brought in pursuance of this contention* and in prospect there is the $50,000 ($59,000) mortgage and note not yet in litigation.

With respect to Point III (respondent's brief, pp. 181-187), respondent has wholly failed to recognize the import of the admitted fact that it appeared generally in each Delaware case *and pleaded res adjudicata,* thereby volun-

tarily conferring upon the Delaware courts jurisdiction of the legal issue as to the effect of the Foreclosure Decree as an adjudication against Phoenix on the matters in suit in Delaware. *It was not until after the trial of the Delaware case reported in 14 Atl. (2d) 386, that respondent ran back to Iowa and filed the Supplemental and Ancillary proceeding to which certiorari is here directed.* In other words, the relief by virtue of the defense of *res adjudicata* may have been legally adequate, but to respondent it appeared that it would ultimately be unsatisfactory. Therefore the shift of position.

No reply appears necessary to respondent's answer (pp. 188-197) to petitioner's Point IV (pp. 86-88) and with respect to petitioner's point V (pp. 88-89), respondent (p. 197) has attempted no answer.

Point VI of petitioner's brief (pp. 90-95) serves to illustrate the two horns of a dilemma upon which respondent's case is impaled. Petitioner says, (1) that there was no adjudication against it in the Foreclosure Cause because of the absence of jurisdiction prerequisites with respect to the status of the parties and the issues as framed by the pleadings and prayers. Petitioner says, (2) that for there to have been an adjudication against Phoenix with respect to its underlying claims, notes, contracts and accounts, Phoenix must necessarily have been an indispensable party and that, if it had that status, the Federal Court had no jurisdiction of either parties or subject matter because of the lack of the necessary diversity of citizenship (Bridge Company and Phoenix being both Delaware corporations).

In respondent's brief (pp. 197-200), the petitioner's authorities are attempted to be distinguished because, says respondent (p. 199):

(a) It appeared in those cases that there was a substantial and indispensable interest held by a party not a party to the record, or

(b) The cases appeared to be those in which the introduction of an indispensable party, holding an interest in the lawsuit, ousted jurisdiction.

Both (a) and (b) are exactly the case sub judice. No one may properly question the "substantial and indispensable" character of Phoenix' interests. No one may properly question but that Phoenix was involuntarily impleaded as a party. Therefore, as to all issues except that of mortgage foreclosure, the court was without statutory jurisdiction. On the other hand, if Phoenix' status as such party was, as the court held, merely "formal," there was never any jurisdiction with respect to the parties and subject matter to support an adjudication.

B.

Respondent's Argument With Respect to Petitioner's Alternative or Secondary Contention.

(Points VII to IX; Petitioner's brief, pp. 96-105; Respondent's brief, pp. 200-208.)

If this court shall agree with petitioner's primary contention that the Foreclosure Decree was not a valid adjudication against Phoenix with respect to the issues raised by the Supplemental and Ancillary Bill, the result of a reversal in this respect will, of necessity, it seems, result in a decree dismissing the Supplemental and Ancillary Bill. In this situation, no injunctive or other relief whatsoever under the bill being proper, petitioner's alternative or secondary contention will have no application.

However, if the Supreme Court should disagree with petitioner's primary contention (but only in that event), petitioner takes the position that the maxim: "He who seeks equity must do Equity" and the particular application of that maxim, familiarly known as "Lord Redesdale's Rule," permits the "reopening" of the decree supporting the purported adjudication. Therefore, petitioner, as the defendant to a Supplemental and Ancillary Bill, not only to implement but also to enlarge the scope and effect of a former decree, should have been permitted to plead its defenses and to offer its evidence to establish that the former decree is not a "right" one.

Respondent's brief on this point (pp. 200-208) indicates that respondent has no proper understanding thereof. This is well illustrated by petitioner's attack (p. 200) upon petitioner's statement (p. 96) that the foreclosure decree was "wrong" because failing to recognize Phoenix' "*bona fide* claims." In this respect, respondent says (p. 200) that petitioner's contention is "in utter disregard of the fact that the Federal Courts have determined that they have no existence." Such statement wholly fails to give recognition to the doctrine of *Lawrence Mfg. Co. v. Janesville Cotton Mills, supra*, that "where a party returns to a Court of Chancery to obtain its aid in executing a former decree, *it is at the risk of opening up such decree.*"

Because the *Lawrence Mfg. Co.* case involved a *consent decree* in the original proceeding and because *Corpus Juris* cites some of the cases under the heading "Judgments by Agreement or Consent," Title "Judgments" (Respondent's brief, p. 201), respondent jumps to the unsupported conclusion that "Lord Redesdale's Rule" only applies where the decree sought to be implemented, enforced or enlarged

was the result of *consent or default* on the part of the original defendant.

Such is not the law and the cases impose no such limitation upon the principle. Respondent having cited *Corpus Juris* in aid of its apparent contention that the rule applies only to consent or default decrees, it is appropriate that petitioner should refer to the same work to show that it has no such limitation. In 21 C. J., Title "Equity," with relation to "Enforcement and Performance of Decrees" (Sec. 865, p. 692) by "Bill in Equity" (Sec. 867, p. 695), it is stated at p. 697 that a defendant in such a later suit or proceeding "*may ask that the entertainment of the application shall be subject to the condition that the justice of the decree as against him shall be considered.*" For this proposition are cited all of the cases appearing on petitioner's brief and many others including *Wadhams v. Gay*, 73 Ill. 415, where the court said (at p. 435):

> "We do not regard that it militates with the doctrine of the conclusive effect of what is *res adjudicata*, that where there is an incomplete decree, and it is ineffective for want of the provision of any means for its execution, and an application is made to a court of equity to supply the imperfection so as to render the decree effective, that then it is admissible to look at the real nature and character of the decree, as it may appear in the light of surrounding circumstances, for the purpose of determining whether there is such an equitable ground for action as will move a court of equity to interpose. Equity will penetrate beyond the covering of form, and look at the substance of a transaction, and treat it as it really and in essence is, however, it may seem."

The Circuit Court of Appeals recognized no limitation of the character mentioned by respondent in the case

below. In the opinion below, Circuit Judge Thomas said (115 Fed. (2d) at p. 11) that the rule "is applicable only in cases where a party is seeking to modify or enlarge an incomplete decree and then enforce it." Continuing, the Circuit Court said:

> "In such a case the entire cause may be re-examined to determine the existence of equitable grounds for relief." (Citing Federal cases.)

The Circuit Court denied the application of the rule because it said (p. 11) that here "The Bridge Company is not seeking to 'piece out' an incomplete decree and then enforce it." This was an entirely new and novel idea in the case, not briefed or argued by respondent below and appearing for the first time in the opinion of the court, *supra*. This was one of the principal grounds of petition for rehearing below (denied, R. 831), and in this Court has been the subject of a separate *reason* relied on for allowance of certiorari (petition for certiorari, p. 18, l), a separate *specification of error* (petitioner's brief, p. 58 (8)), and is the subject comprehensively argued in Point VIII of petitioner's brief (pp. 98-103).

Point VIII of respondent's brief, however, purporting to be an "Answer to petitioner's Point Eight" (pp. 205-208) on this point is wholly unintelligible and indicates that respondent either does not understand the question or has chosen to talk about irrelevant subjects for purposes of confusion and to avoid meeting this issue of law. Point VIII of respondent's brief bears no understandable relation to the corresponding point of petitioner's brief.

However, as pointed out under those headings of petitioner's brief entitled "The 'two-stage' Theory of the Parties" (pp. 14-17) and "The Non-Participation of Phoenix

at the Trial" (pp. 17-21) and in the "Reply to Respondent's Statement of the Case" herein, *the Foreclosure Decree was in substance a default decree against Phoenix Finance Corporation with exactly the same legal effect as though it had been a decree pro confesso.* Phoenix did not participate or offer evidence and all parties considered that this was the proper procedure at the first stage. This conformed to recognized Federal practice (see petitioner's brief—pp. 83-84).

Respondent does not answer or in any manner refer to Point IX of petitioner's brief (pp. 103-105). With respect thereto, petitioner in this reply brief has heretofore pointed out even more elaborately than in its principal brief, the circumstances of *intrinsic* fraud, misrepresentation and imposition in the Foreclosure Cause.

It is respectfully submitted that the decree below should be reversed so as to effect (a) a dismissal of the Supplemental and Ancillary Bill, or, in the alternative, (b) so as to require respondent, as complainant below, to show that the Foreclosure Decree was "right" and so as to permit petitioner, as defendant below, to show that a decree for the complainant below on the Supplemental and Ancillary Bill makes the court below a further "instrument of this injustice."

JAMES R. MORFORD,
Attorney for Petitioner.

MARVEL & MORFORD,
ZIMMERMAN & NORMAN,
CASPER SCHENK,
Of Counsel.